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Do Lawyers Affect Grievance Arbitration Outcomes? The Newfoundland Experience

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Résumé de l'article

Il y a peu de doute que les parties font l'hypothèse que les caractéristiques de l'arbitre, telles son éducation, son âge et son expérience influencent les résultats de l'arbitrage. Même là, il y a pénurie de preuve de l'existence d'un lien entre les caractéristiques de l'arbitre et son comportement. De façon plus particulière, les chercheurs ont examiné la question de savoir si la formation juridique d'un arbitre (ou son absence) influençait ses décisions.

Cette avenue de recherche a été initiée par les conclusions de Bankston (1976) à l'effet que les arbitres-avocats divergeaient d'opinion sur certaines questions de relations du travail comparativement aux arbitres dont la formation de base était l'économique, la gestion ou les relations industrielles. Cependant, la preuve prépondérante est à l'effet que les arbitres diplômés en droit ne décident pas des griefs différemment des autres arbitres sans cette formation.

Les résultats empiriques eu égard à l'efficacité de la représentation par avocat sont quelque peu inconsistants. Goldblatt (1974) a conclu que les syndicats gagnaient comparativement plus de griefs lorsqu'ils étaient représentés par un avocat et que l'employeur ne l'était pas. L'inverse est aussi vrai. Cela suggère alors que c'est ce déséquilibre dans la représentation qui est le facteur critique eu égard aux résultats de l'arbitrage de grief. Ponak (1987) a étudié 150 sentences arbitrales de congédiement en Alberta et en est arrivé à la même conclusion. À ce jour, l'analyse la plus rigoureuse de l'impact des avocats sur les résultats en arbitrage de griefs est celle de Block et Stieber (1987) étudiant plus de 1 000 griefs de congédiement. Utilisant un modèle *probit*, ils ont également trouvé support pour l'hypothèse du déséquilibre, à savoir qu'une partie réussit comparativement mieux lorsque représentée par un avocat et que l'autre ne l'est pas.

La présente étude rapporte une analyse en profondeur du contenu de toutes les décisions arbitrales rendues en matière disciplinaire dans la province canadienne de Terre-Neuve entre 1980 et 1992. Les conclusions en sont que les parties étaient moins portées à recourir à un arbitre-avocat dans les cas de congédiement que dans les cas des autres mesures disciplinaires. Les parties avaient aussi eu moins tendance à nommer un arbitre-avocat quand le motif de la mesure disciplinaire visait l'absentéisme, le rendement au travail ou l'assault (bagarre). Comparativement aux autres secteurs, la fonction publique provinciale avait plus recours à des arbitres-avocats.

L'employeur avait tendance à recourir plus souvent à un procureur-avocat dans les cas de congédiement comparativement aux autres mesures disciplinaires. L'employeur préférait aussi être représenté par un avocat quand le syndicat impliqué était le Syndicat canadien de la fonction publique ou le Syndicat des pêcheurs, de l'alimentation et travailleurs assimilés. Le gouvernement provincial, comparativement aux autres employeurs, avait nettement moins tendance à recourir à des procureurs-avocats de l'extérieur pour le représenter. À titre de plus gros employeur de la province, il pouvait ainsi s'attendre à réaliser des économies et à accroître son efficacité en embauchant des spécialistes de griefs internes plutôt que de recourir à des firmes juridiques extérieures sur une base ad hoc. De fait, le gouvernement provincial était représenté par un avocat dans seulement six des 56 cas l'impliquant.

L'hypothèse nulle à l'effet que la représentation légale n'a aucun impact sur le résultat de l'arbitrage des griefs ne peut pas être rejetée. Il n'y avait non plus aucune interaction significative entre la représentation juridique et le fait qu'un arbitre soit avocat. Il y avait cependant une relation significative négative entre le résultat de l'arbitrage et le fait que l'arbitre soit un avocat dans le premier modèle suggérant que les plaignants avaient moins de chances d'avoir l'avantage quand l'arbitre ou le président du tribunal d'arbitrage était avocat. Cependant, alors que la relation entre ces deux variables demeurait négative, elle cessait d'être statistiquement significative quand on y introduisait l'interaction entre le fait que l'arbitre soit avocat et la représentation juridique.

Les résultats de la présente recherche suggèrent que les délais et les coûts additionnels associés à la représentation par avocat ne semblent pas être compensés par quelconque avantage comparatif quant au résultat obtenu. Nos conclusions convergent avec le peu de recherche sur les influences des avocats, sauf qu'ici il n'y a pas de preuve au soutien de ce que nous avons appelé l'hypothèse du déséquilibre. Cependant, même s'il y a quelque chose à dire en faveur de cette hypothèse, l'avantage en est éphémère puisqu'il disparait aussitôt que la partie non représentée par avocat décide de l'être. Lorsque les deux parties sont représentées par avocat, les résultats ne semblent pas différer de ceux obtenus lorsqu'aucune d'entre elle n'est ainsi représentée.

Do Lawyers Affect Grievance Arbitration Outcomes?

The Newfoundland Experience

Kenneth Wm. Thornicroft

Unions and employers are no doubt aware that retaining legal counsel necessitates a more expensive and less expeditious grievance arbitration process. But if a party's prospects for success are enhanced by legal representation, the additional delay and expense may be justified. Does legal representation affect grievance outcomes? Most arbitrators are lawyers. Does an arbitrator's legal training affect the outcome of a grievance? These, and other issues are examined in this study. The results suggest that legal representation does not affect grievance outcomes; nor do lawyer-arbitrators decide cases any differently than their lay colleagues.

Over the past decade or more there has been a growing tendency to decry the creeping "legalism" of the grievance arbitration process (Allen and Jennings 1988; Berkeley 1989; Raffaele 1982). The parties (and most especially management) are frequently represented by legal counsel. For example, in a recent Ontario study, Barnacle (1991) found that management was legally represented in about 80% of the cases; the comparative figure for unions was about 50%. Similar figures (73%/51%) were reported in a large-sample U.S. study (American Arbitration Association 1984). There does seem to be a

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consensus in the literature that lawyers are associated with delay in the grievance arbitration process (Barnacle 1991; Goldblatt 1974; Thornicroft, in press). No doubt the parties are aware that retaining legal counsel necessitates a more expensive and a less expeditious process. Even so, if a party's prospect of success is enhanced by legal representation, the additional delay and expense may be justifiable. What factors affect a party's decision to retain legal counsel? Are grievors or employers more likely to prevail if they are represented by legal counsel at an arbitration hearing? If *both* parties are represented, is any "comparative advantage" cancelled out?

Many, indeed a majority, of arbitrators or arbitration panel chairs are lawyers (*cf. e.g.*, Allen and Jennings 1988; Bemmels 1990a, 1990b; Heneman and Sandver 1983; Thornton and Zirkel 1990). Does an arbitrator's legal training affect the outcome of the grievance? Despite a dearth of evidence that lawyer-arbitrators decide cases differently from non-lawyers, many parties prefer to have a lawyer serve as arbitrator or panel chair. Are there systematic differences in the kinds of cases that come before lawyer-arbitrators for determination?

The foregoing issues are examined in this study. In short, the question posed by this research is: "Do lawyers affect arbitration outcomes?". In the following section of this article the extant literature concerning lawyers and the grievance arbitration process is reviewed. The literature review is followed by a description of the current study and a presentation of the empirical results. A final section summarizes the findings of this study and advances some policy recommendations.

LITERATURE REVIEW

The Lawyer-Arbitrator Selection Decision. Most labour relations practitioners have well-defined views about what makes a good arbitrator — experience and "good judgment" are two characteristics that are likely to appear on any list of "desired attributes". In a survey of nearly 300 members of the National Academy of Arbitrators (Allen and Jennings 1988), the following attributes were listed as being most important (in rank order): personal integrity, experience (both as an arbitrator and within labour relations generally), and perceived neutrality. The respondents did not believe that a legal education was particularly necessary to succeed as an arbitrator. In a study concerning parties' selection behaviour of interest arbitrators, Bloom and Cavanagh (1986) found that unions preferred lawyer-arbitrators whereas management preferred arbitrators who were economists. Both parties preferred relatively experienced arbitrators.

The Impact of Lawyer-Arbitrators on Grievance Outcomes. There is little doubt that parties *assume* that arbitrator characteristics such as education, age, and experience affect arbitral outcomes (Briggs and Anderson 1980; Dworkin 1974; Lawson 1981; Primeaux and Brannen 1975; Rezler and Peterson 1978). Even so, there is a dearth of evidence supporting a linkage between arbitrator background and arbitrator behavior (Fleming 1965; Nelson and Curry 1981; Westerkamp and Miller 1971). In particular, researchers have queried whether or not an arbitrator's legal training (or the lack thereof) affects his or her decisions. Perhaps this stream of research was sparked by Bankston's (1976) finding that lawyer-arbitrators held significantly different views about certain labour relations issues compared to arbitrators whose "home discipline" was economics, business or industrial relations. However, the overwhelming evidence is that arbitrators who hold a law degree do *not* decide cases any differently than arbitrators who are not legally trained (Barnacle 1991; Bemmels 1990a, 1990b; Deitsch and Dilts 1989; Heneman and Sandver 1983; Thornton and Zirkel 1990).

The Impact of Legal Representation on Grievance Outcomes. The empirical evidence concerning the efficacy of legal representation is somewhat inconsistent. Goldblatt (1974) found that unions won comparatively more cases when they were represented by legal counsel and management was not; the reverse pattern also prevailed, suggesting that it is the "imbalance" in legal representation that is the critical factor in grievance arbitration outcomes. Ponak (1987) examined 150 discharge arbitration awards from the province of Alberta and arrived at a similar conclusion. Although not statistically significant, Ponak found (at p. 43) that "when the employer used legal counsel and the union did not, discharge was upheld in more than half of the cases (54%)...when the union but not management used a lawyer, discharge was upheld in only 42% of the cases." The only statistically significant differences arose when neither party used legal counsel (advantage to union) or when both sides used legal counsel (advantage to management). Dickens, Jones, Weekes, and Hart (1985) found that applicants who challenged their dismissals under *Britain's Employment Protection (Consolidation) Act* of 1978 fared relatively better when represented by legal counsel (41% success rate) as compared to those who were represented by a trade union official (35% success rate) or who represented themselves (31% success rate). On the other hand, legal representation did not appear to have any impact on the success rate of employers. Barnacle (1991:164) did not specifically test the "imbalance" hypothesis but nevertheless suggested that "...the greater relative use of legal counsel was associated with greater 'win' rates for both parties."

However, Goldblatt (1974), Ponak (1987) and Dickens *et al.* (1985) all based their conclusions on bivariate analyses — other potentially relevant factors, such as the grievor's work record or the nature of the disciplinary offence,

were not controlled. To date, the most rigorous analysis of the impact of lawyers on grievance arbitration outcomes is Block and Stieber's study (1987) involving over 1000 discharge grievances. Using a probit model, they also found support for the "imbalance" hypothesis, namely, that a party fares comparably better when it is represented and the other party is not. However, contrary to Ponak (1987), Block and Stieber found (at p. 548) "...that when both sides use attorneys the awards are the same as when neither side uses an attorney."

DATA AND METHODS

This study is based on an in-depth content analysis of all discipline or discharge grievance arbitration awards decided in the Canadian province of Newfoundland during the period 1980 to 1992. Over this thirteen-year period, a total of 350 decisions were filed with the provincial Department of Employment and Labour Relations. Approximately two-thirds (229) of the cases were discharge cases; the balance (121) involved a range of lesser disciplinary penalties. Newfoundland's collective bargaining laws require that disputes concerning bargaining unit employee discipline or discharge be resolved by grievance arbitration. Arbitrators (or arbitration boards[1]) are further directed to forward a copy of their decision to the provincial Minister of Employment and Labour Relations within three days of issuance. Of course, one cannot be certain that every award issued over the thirteen-year period was filed with the Department, or indeed, that every arbitration award remained on file with Department. Even so, if this current data set does *not* represent the population of arbitral awards rendered during the period in question, it is very close to it.

The arbitration awards analyzed in this study ranged from about fifteen pages to over fifty pages in length. The awards were coded by two upper-level business administration students majoring in industrial relations. In order to minimize the problem of interrater reliability, the two coders underwent a precoding "training program"; following completion of the training program, interrater reliability exceeded .90 on a sample of 16 cases. As a further reliability check, the logit analyses reported here were re-estimated with an additional dummy variable reflecting the individual student coder — in all cases this "control" variable failed to even approach statistical significance.

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1 During the period in question, about one-third of all discipline or discharge grievance arbitration awards were rendered by tripartite panels; a similar distribution was reported by Barnacle (1991) in his Ontario study. Goldblatt (1974), in an earlier Ontario study, and Ponak (1987) in an Alberta study, both reported that panels heard about two-thirds of the cases.

Several research questions were investigated. First, what are the factors that are associated with the appointment of a lawyer-arbitrator? Second, what factors are associated with a union or management decision to retain legal counsel? Third, does the fact that lawyers are involved in a grievance arbitration hearing, either as arbitrator or as counsel, affect the outcome?

With respect to the first two questions, namely, the utilization of lawyers in the grievance arbitration process, two separate logistic regression models were specified using LOGIT 1.0 (Steinberg 1988). Because the dependent variables in each equation were categorical, ordinary least squares regression is not an appropriate data analytic technique (Aldrich and Nelson 1984). LOGIT estimates the probability of the dependent variable being a given value and identifies the independent variables that are significant predictors. The dependent variables were ARBLWYER and MGMTLWYER, respectively, each being a dummy variable taking a value of one if the arbitrator was a lawyer, or if management was represented by a lawyer, and zero otherwise. A separate logit equation for UNIONLWYR could not be estimated because grievors were represented by legal counsel in only 28 of the 350 cases.

The independent variables in the two equations included the reason for discipline (ATTENDANCE; SUBSTANCE ABUSE; THEFT/DISHONESTY; INSUBORDINATION; WORK PERFORMANCE; ASSAULT/FIGHTING; OTHER OFFENCES), the union involved (Canadian Union of Public Employees [CUPE]; Newfoundland Association of Public Employees [NAPE]; Fisherman, Food and Allied Workers Union [FFAW]; United Steelworkers of America [USWA]; OTHER UNIONS), the employment sector (RESOURCES; MANUFACTURING; PUBLIC SECTOR — GOVERNMENT; PUBLIC SECTOR — HEALTH; PUBLIC SECTOR — EDUCATION; OTHER SERVICES), the ARBITRATION FORMAT (panel or sole arbitrator), and whether the grievance concerned a discharge or some lesser disciplinary penalty (DISCIPLINE/DISCHARGE). Additionally, in the MGMTLWYER equation, ARBLWYER was also included as an independent variable.

With respect to the third research question, namely, the impact of lawyers on grievance arbitration outcomes, two separate models (the second including interaction terms between legal representation and ARBLWYR) were specified in which the dependent variable, OUTCOME, was a simple dichotomous variable indicating whether or not the grievance was upheld (either in whole or in part) or denied (0 = Grievance Denied; 1 = Grievance Upheld). The principal independent variables were legal representation (NEITHER PARTY REPRESENTED; MANAGEMENT ONLY REPRESENTED; UNION ONLY REPRESENTED; BOTH PARTIES REPRESENTED), and the dummy variable, ARBLWYR. Additional independent variables included the reason for

discipline, the grievor's job category (UNSKILLED/SEMI-SKILLED; SKILLED; CLERICAL; SUPERVISORY/PROFESSIONAL), the grievor's disciplinary record (UNBLEMISHED RECORD; RELATED OFFENCES; UNRELATED OFFENCES; NO RECORD MENTIONED), the burden of proof (*cf.* Thornicroft 1989) applied by the arbitrator (PREPONDERANCE OF EVIDENCE; CLEAR AND CONVINCING; BEYOND A REASONABLE DOUBT), the ARBITRATION FORMAT and DISCIPLINE/DISCHARGE.

A frequency distribution for all variables utilized in the study (including the various omitted categories) is set out in Table 1.

RESULTS AND ANALYSIS

Use of Legal Counsel. While lawyers are undeniably well-entrenched in the grievance arbitration process, at least in Newfoundland, the parties are not invariably represented by legal counsel. In over one-half of the cases, *neither* party was represented by legal counsel. Overall, lawyers represented at least one of the parties in approximately 44% of the cases. This latter figure can be disaggregated as follows (see Table 1):

- Management only represented by legal counsel = 124 (35.7%)
- Union only represented by legal counsel = 11 (3.2%)
- Both parties represented by legal counsel = 17 (4.9%)

Thus, a clear "imbalance" in legal representation was detected — management was much more likely to be represented than was the grievor (40.6% versus 8.1%). A similar imbalance prevailed when only the "discharge" cases were examined:

- Management only represented by legal counsel = 87 (38.1%)
- Union only represented by legal counsel = 5 (2.2%)
- Both parties represented by legal counsel = 10 (4.4%)

One can only speculate as to the reasons for this observed result; certainly, the substantial costs of retaining legal counsel cannot be overlooked as a contributing factor. Another factor may flow from the fact that relatively few unions in the province are involved in a very large share of all arbitrations. For example, in 1992, approximately two-thirds of all arbitration awards involved only four unions (Department of Employment and Labour Relations 1992); these same four unions accounted for nearly 63% of the total discipline and discharge grievance awards rendered in the province during the period 1980 to 1992. For these unions, both economic and efficiency gains may be realized if arbitrations are handled internally by a specialist grievance officer rather

TABLE 1

Variable Proportions and Number of Observations

Variable	*Proportion*	*No. of Observations*
GRIEVANCE UPHELD	.580	350
DISCHARGE CASE	.654	350
Reason for Discipline		350
ATTENDANCE	.171	
SUBSTANCE ABUSE	.109	
THEFT/DISHONESTY	.180	
INSUBORDINATION	.149	
WORK PERFORMANCE	.317	
ASSAULT/FIGHTING	.046	
OTHER OFFENCES	.029	
Union		350
CUPE	.074	
NAPE	.320	
FFAW	.151	
USWA	.077	
OTHER UNIONS	.377	
Sector		350
RESOURCES	.274	
MANUFACTURING	.060	
PUBLIC SECTOR—GOVERNMENT	.160	
PUBLIC SECTOR—HEALTH	.123	
PUBLIC SECTOR—EDUCATION	.037	
OTHER SERVICES	.346	
Job Category		346
UNSKILLED/SEMI-SKILLED	.682	
SKILLED	.223	
CLERICAL	.014	
SUPERVISORY/PROFESSIONAL	.081	
Grievor's Disciplinary Record		346
UNBLEMISHED RECORD	.373	
RELATED OFFENCES	.301	
UNRELATED OFFENCES	.049	
NO RECORD MENTIONED	.278	
Burden of Proof		350
PREPONDERANCE OF EVIDENCE	.774	
CLEAR AND CONVINCING	.203	
BEYOND A REASONABLE DOUBT	.023	
ARBITRATION PANEL	.334	350
LAWYER-ARBITRATOR	.489	350
Legal Representation		347
MANAGEMENT LAWYER	.406	
UNION LAWYER	.081	
NEITHER PARTY REPRESENTED	.562	
MANAGEMENT ONLY REPRESENTED	.357	
UNION ONLY REPRESENTED	.032	
BOTH PARTIES REPRESENTED	.049	

than by independent legal counsel. In fact, while these four unions accounted for approximately 63% of the total number of cases over the thirteen-year period spanned by the data, they only accounted for about one-quarter of the cases in which unions were legally represented.

By contrast, in 1992, the four employers most frequently involved in grievance arbitration accounted for only 29% of the total caseload; 49 employers (including three large employer associations) accounted for the balance, for an overall average of 2.2 arbitrations per employer (Department of Employment and Labour Relations 1992). For most employers there are no "efficiency gains" to be had by employing a full-time grievance arbitration specialist; thus, the observed tendency for employers to retain independent legal counsel.

TABLE 2

Logit Analysis of Lawyers' Involvement in Arbitration

Variable	*(1)* Δ *Prob. ARBLWYR=1*	*(2)* Δ *Prob. MGMTLWYR=1*
Constant	.3091	-.1973
DISCIPLINE/DISCHARGE	-.1103†	.1402*
Reason for Discipline		
ATTENDANCE	-.3531†	-.2044
SUBSTANCE ABUSE	-.2101	.2357
THEFT/DISHONESTY	-.1597	.0129
INSUBORDINATION	-.3145	.1288
WORK PERFORMANCE	-.3804*	.0831
ASSAULT/FIGHTING	-.4639*	.1258
Union		
CUPE	-.0720	.2338†
NAPE	-.0171	-.2258*
FFAW	-.2954*	.4805**
USWA	-.0418	.0065
Sector		
RESOURCES	-.0085	.0990
MANUFACTURING	.1596	.1306
PUBLIC SECTOR—GOVERNMENT	.2865**	-.3706**
PUBLIC SECTOR—HEALTH	.1271	-.1018
PUBLIC SECTOR—EDUCATION	.1542	.0117
ARBITRATION FORMAT	.0945	-.0695
LAWYER-ARBITRATOR		-.0334
N	350	347
Log Likelihood	-218.07	-175.09
Chi-Square	48.89**	118.62**
Asymptotic F	3.06**	6.98**

† $p < .10$ (two-tailed test); * $p < .05$ (two-tailed test); ** $p < .01$ (two-tailed test)

All variables are categorical. The omitted categories include the following: OTHER OFFENCES; OTHER UNIONS; and OTHER SERVICES.

Logit Results: Predicting Lawyers' Involvement in Grievance Arbitration. The logit results are reported in Table 2. Because logit coefficients are not directly interpretable, the independent variable derivatives are presented. These latter values represent the change in the probability that the arbitrator (or arbitration panel chair) will be a lawyer (first column), or that management will be represented by legal counsel (second column) given a one-unit change in the value of the various independent variables. The results suggest the parties were about 11% less likely to appoint a lawyer-arbitrator in discharge (versus discipline) cases. The parties were also less likely to appoint a lawyer-arbitrator when the reason for discipline concerned attendance, work performance, or assault/fighting. Relative to other employment sectors, cases arising in the provincial civil service were about 29% more likely to be heard by lawyer-arbitrators.

Management was about 14% more likely to retain legal counsel in discharge (versus discipline) cases. Management also preferred to be legally represented when the union involved was either CUPE or the FFAW. The provincial government, relative to other employers, was markedly less likely to retain legal counsel on its own behalf — this is reflected by the significant and negative values for NAPE (the principal union in the provincial public service) and PUBLIC SECTOR — GOVERNMENT. Of course, the provincial government, as the province's largest employer, could expect to reap both economic and efficiency gains by employing in-house grievance specialists rather than by retaining independent legal counsel on an *ad hoc* basis. In fact, the provincial government was legally represented in only 6 of the 56 cases in which it was the respondent employer.

Lawyers and Grievance Outcomes. The logit results with respect to OUTCOME are presented in Table 3. Once again, the values reported are the independent variable derivatives which represent the change in the probability that the grievance will be upheld given a one-unit change in the value of the independent variable. The independent variable derivatives for all independent variables are reported in column 1, while column 2 includes an additional set of values for the interaction terms (LEGAL REPRESENTATION × ARBLWYR) and excludes the job category control variables. As shown in Table 3, grievors were more likely to succeed when the underlying disciplinary offence involved allegations of ASSAULT/FIGHTING, ATTENDANCE, WORK PERFORMANCE, THEFT/DISHONESTY, or SUBSTANCE ABUSE as compared to grievors disciplined for INSUBORDINATION or some OTHER OFFENCE.

Not surprisingly, those grievors with a relevant disciplinary record (RELATED OFFENCES) were about 19% less likely to win their cases than other grievors. When the arbitrator or arbitration panel held the employer to

TABLE 3

Logit Analysis of OUTCOME

Variable	*(1)* Δ *Probability of Grievance Being Upheld*	*(2)*
Constant	-.4195	-.2402
DISCIPLINE/DISCHARGE	.0706	.0626
Reason for Discipline		
ATTENDANCE	.4104*	.4087*
SUBSTANCE ABUSE	.3332†	.3162†
THEFT/DISHONESTY	.3625†	.3655*
INSUBORDINATION	.1898	.1865
WORK PERFORMANCE	.3699*	.3504†
ASSAULT/FIGHTING	.4869*	.4492†
Job Category		
UNSKILLED/SEMI-SKILLED	.0097	
SKILLED	-.0590	
CLERICAL	.0855	
Grievor's Disciplinary Record		
UNBLEMISHED RECORD	.0651	.0820
RELATED OFFENCES	-.1960*	-.1865*
UNRELATED OFFENCES	-.1103	-.0984
Burden of Proof		
PREPONDERANCE OF EVIDENCE	.3102†	.3340†
CLEAR AND CONVINCING	.0672	.0881
Legal Representation		
NEITHER PARTY REPRESENTED	-.0446	-.2914
MANAGEMENT ONLY REPRESENTED	-.0170	-.1746
UNION ONLY REPRESENTED	.2351	-.2504
ARBLWYR × NEITHER PARTY		.3520
ARBLWYR × MANAGEMENT ONLY		.1617
ARBLWYR × UNION ONLY		.7006
LAWYER-ARBITRATOR	-.1525*	-.4263
ARBITRATION FORMAT	.0268	.0270
N	341	342
Log Likelihood	-207.72	-206.91
Chi-Square	48.37**	51.08**
Asymptotic F	2.55**	2.69**

† $p < .10$ (two-tailed test); * $p < .05$ (two-tailed test); ** $p < .01$ (two-tailed test)

All variables are categorical. The omitted categories include the following: OTHER OFFENCES; SUPERVISORY/PROFESSIONAL; NO RECORD MENTIONED; BEYOND A REASONABLE DOUBT; and BOTH PARTIES REPRESENTED.

the lowest evidentiary standard, PREPONDERANCE OF EVIDENCE, grievors were more likely to prevail. This latter result probably reflects the fact that the higher evidentiary thresholds (CLEAR AND CONVINCING; BEYOND A REASONABLE DOUBT) are usually reserved for only the most serious of allegations (for example, theft). Because false allegations of theft are themselves actionable under the law of defamation, it is likely that employers proceed to arbitration only when they are very confident of being able to prove their case.

The null hypothesis that legal representation has no impact on grievance outcomes cannot be rejected. Nor was there any significant interaction effect between legal representation and ARBLWYR. There was a significant and negative relationship between OUTCOME and ARBLWYR in the first model suggesting that grievors were about 15% less likely to prevail when the arbitrator (or arbitration panel chair) was a lawyer. However, while the relationship between those two variables remained negative, it was no longer statistically significant when the interaction terms between ARBLWYR and legal representation were also included (column 2).

SUMMARY AND POLICY IMPLICATIONS

The decision to retain a lawyer to act as arbitrator appears to be most strongly influenced by the seriousness of the case, the underlying reason for discipline, and whether the case arises in the provincial civil service. Management's decision to retain legal counsel appears to be primarily influenced by the seriousness of the case and the employment sector. Employers in the fisheries sector (where the FFAW is the principal union) are significantly more likely to retain legal counsel than any other employer group.

There are some interesting contrasts. While discharge grievances and those filed by the FFAW tend to be arbitrated by nonlawyers, management tends to retain legal counsel in such instances. On the other hand, while public sector employers tend to favour lawyer-arbitrators, this preference does not extend to retaining legal counsel. In fact, the provincial government is substantially *less likely* to retain legal counsel as compared to any other employer category.

Do lawyers affect grievance outcomes? Despite the apparent delay traceable to the presence of lawyers (both as arbitrators and as counsel) in the grievance arbitration process,[2] there may be valid reasons for permitting lawyers'

2 A related study found that lawyers' involvement (both as counsel and as arbitrator) accounted for about one-half of the mean total delay (filing of grievance to final arbitration award) of six months (Thornicroft, in press).

involvement. The right to counsel is a fundamental democratic right; this right may be especially important in the context of the employee disciplinary process. Indeed, a legislative prohibition may raise constitutional issues, especially in the public sector. While section 10(b) of the *Canadian Charter of Rights and Freedoms* specifically guarantees the right to counsel, this section applies only when the individual has been arrested or detained. However, section 7 of the Charter (the "life, liberty, and security of the person" clause) may create a derivative constitutionally protected right to legal counsel where a person's employment is at risk. The Supreme Court of Canada has held that the Charter does not apply to private activity where there is no government action.[3] Thus, while the Charter clearly applies in the case of a public sector employer, the Charter's application in the private sector context is uncertain. The Charter may well apply to the private sector if the requisite "government action" could be found in the standard legislative requirement that all collective bargaining agreement disputes be resolved by final and binding arbitration failing agreement between the parties.[4] Even so, it is probably constitutionally permissible for the parties themselves to eliminate legal counsel from the grievance arbitration process by way of an express provision contained in a collective bargaining agreement. Given the empirical evidence suggesting that lawyers have no substantive impact on grievance outcomes other than to increase both delay and expense, a contractual provision limiting or even eliminating lawyers' involvement in grievance arbitration is quite likely permissible under the "reasonable limits" provision contained in section 1 of the Charter.[5]

Should the parties ban lawyers from the grievance arbitration process? The results of this study suggest that lawyer-arbitrators and legal representation had no statistically significant impact on grievance outcomes. Thus, the delay and added costs associated with legal representation (in the order of $5000 or more for an "average" case) do not appear to be offset by any comparative "outcome" advantage. The modest literature on "lawyer effects" is largely consistent with the findings presented here, save that in this study there was no evidence supporting what has been termed the "imbalance hypothesis" (namely, where one party has legal counsel and the other does not). However, even if there is something to be said for the imbalance hypothesis, the "advantage" is evanescent — disappearing as soon as the unrepresented party also retains legal counsel. When both parties are represented, the result

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3 *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

4 *cf. e.g.*, section 86 of the Newfoundland *Labour Relations Act*, and *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, (1989) 59 D.L.R. (4th) 416.

5 Section 1 provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

seems to differ little than when neither party is represented. Accordingly, why incur the additional expense and delay? Perhaps those resources committed to obtain legal representation could be put to a more productive use — by both parties.

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La présence d'avocats influence-t-elle les résultats en arbitrage de grief?
L'expérience de Terre-Neuve

Il y a peu de doute que les parties font l'hypothèse que les caractéristiques de l'arbitre, telles son éducation, son âge et son expérience influencent les résultats de l'arbitrage. Même là, il y a pénurie de preuve de l'existence d'un lien entre les caractéristiques de l'arbitre et son comportement. De façon plus particulière, les chercheurs ont

examiné la question de savoir si la formation juridique d'un arbitre (ou son absence) influençait ses décisions.

Cette avenue de recherche a été initiée par les conclusions de Bankston (1976) à l'effet que les arbitres-avocats divergeaient d'opinion sur certaines questions de relations du travail comparativement aux arbitres dont la formation de base était l'économique, la gestion ou les relations industrielles. Cependant, la preuve prépondérante est à l'effet que les arbitres diplômés en droit ne décident pas des griefs différemment des autres arbitres sans cette formation.

Les résultats empiriques eu égard à l'efficacité de la représentation par avocat sont quelque peu inconsistants. Goldblatt (1974) a conclu que les syndicats gagnaient comparativement plus de griefs lorsqu'ils étaient représentés par un avocat et que l'employeur ne l'était pas. L'inverse est aussi vrai. Cela suggère alors que c'est ce déséquilibre dans la représentation qui est le facteur critique eu égard aux résultats de l'arbitrage de grief. Ponak (1987) a étudié 150 sentences arbitrales de congédiement en Alberta et en est arrivé à la même conclusion. À ce jour, l'analyse la plus rigoureuse de l'impact des avocats sur les résultats en arbitrage de griefs est celle de Block et Stieber (1987) étudiant plus de 1 000 griefs de congédiement. Utilisant un modèle *probit*, ils ont également trouvé support pour l'hypothèse du déséquilibre, à savoir qu'une partie réussit comparativement mieux lorsque représentée par un avocat et que l'autre ne l'est pas.

La présente étude rapporte une analyse en profondeur du contenu de toutes les décisions arbitrales rendues en matière disciplinaire dans la province canadienne de Terre-Neuve entre 1980 et 1992. Les conclusions en sont que les parties étaient moins portées à recourir à un arbitre-avocat dans les cas de congédiement que dans les cas des autres mesures disciplinaires. Les parties avaient aussi eu moins tendance à nommer un arbitre-avocat quand le motif de la mesure disciplinaire visait l'absentéisme, le rendement au travail ou l'assault (bagarre). Comparativement aux autres secteurs, la fonction publique provinciale avait plus recours à des arbitres-avocats.

L'employeur avait tendance à recourir plus souvent à un procureur-avocat dans les cas de congédiement comparativement aux autres mesures disciplinaires. L'employeur préférait aussi être représenté par un avocat quand le syndicat impliqué était le Syndicat canadien de la fonction publique ou le Syndicat des pêcheurs, de l'alimentation et travailleurs assimilés. Le gouvernement provincial, comparativement aux autres employeurs, avait nettement moins tendance à recourir à des procureurs-avocats de l'extérieur pour le représenter. À titre de plus gros employeur de la province, il pouvait ainsi s'attendre à réaliser des économies et à accroître son efficacité en embauchant des spécialistes de griefs internes plutôt que de recourir à des firmes juridiques extérieures sur une base ad hoc. De fait, le gouvernement provincial était représenté par un avocat dans seulement six des 56 cas l'impliquant.

L'hypothèse nulle à l'effet que la représentation légale n'a aucun impact sur le résultat de l'arbitrage des griefs ne peut pas être rejetée. Il n'y avait non plus aucune interaction significative entre la représentation juridique et le fait qu'un arbitre soit avocat. Il y avait cependant une relation significative négative entre le résultat de l'arbitrage et le fait que l'arbitre soit un avocat dans le premier modèle suggérant que les

plaignants avaient moins de chances d'avoir l'avantage quand l'arbitre ou le président du tribunal d'arbitrage était avocat. Cependant, alors que la relation entre ces deux variables demeurait négative, elle cessait d'être statistiquement significative quand on y introduisait l'interaction entre le fait que l'arbitre soit avocat et la représentation juridique.

Les résultats de la présente recherche suggèrent que les délais et les coûts additionnels associés à la représentation par avocat ne semblent pas être compensés par quelconque avantage comparatif quant au résultat obtenu. Nos conclusions convergent avec le peu de recherche sur les influences des avocats, sauf qu'ici il n'y a pas de preuve au soutien de ce que nous avons appelé l'hypothèse du déséquilibre. Cependant, même s'il y a quelque chose à dire en faveur de cette hypothèse, l'avantage en est éphémère puisqu'il disparait aussitôt que la partie non représentée par avocat décide de l'être. Lorsque les deux parties sont représentées par avocat, les résultats ne semblent pas différer de ceux obtenus lorsqu'aucune d'entre elle n'est ainsi représentée.